

June 25, 2002

PUBLIC UTILITIES COMMISSION
Underground Facility Damage Prevention
Requirements (Chapter 895)

NOTICE OF RULEMAKING

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

I. SUMMARY

With this Notice of Rulemaking, we propose to amend Chapter 895, the Underground Facility Damage Prevention Requirements, to conform to the Legislature's recent changes to the law protecting underground facilities and to clarify the existing rule. These proposed amendments would eliminate the rule's applicability to architects and designers, alter and clarify the responsibilities of certain excavators, create new exemptions for certain excavator activities, place new requirements on underground facility operators, and clarify the level of fines imposed for violations.

II. BACKGROUND

The law protecting underground facilities requires that a damage prevention system exist in Maine to ensure that adequate safety precautions protect the public when excavation occurs near an underground facility. 23 M.R.S.A. § 3360-A. The statute establishes procedures that must be followed by excavators and underground facility operators when excavation occurs. Dig Safe System, Inc. (Dig Safe), an independently owned corporation that operates the New England regional damage prevention system, currently carries out the underground safety system directed by law.

During the second session of the 120th Legislature, Maine's Legislature approved revisions to 23 M.R.S.A. § 3360-A.¹ The law was enacted as emergency legislation and therefore took effect when approved on March 28, 2002.

III. DISCUSSION OF AMENDMENTS

Section 2: Definitions

We propose the following additions and modifications of definitions in accordance with the recently passed legislation.

¹An Act to Improve the Safety Provided by the Underground Facilities Protection Law, P.L. 2001, ch. 577 (Act).

The definition of “excavation” appearing in Section 2(K) of the rule currently excludes the installation and maintenance of signs performed by the Department of Transportation. We propose to strike this exclusion. P.L. 2001, ch. 577, section 1.

We propose to insert, as Section 2(L-1), a definition for “incident” as an event in which at least one violation of the damage prevention law occurs in the course of an excavation. We have added this term due to our proposed revision of Section 8(E) discussed below.

We propose to insert, as Section 2(S-1), the legislatively adopted definition for “shoulder-grading activity” as the use of equipment with a blade to remove material along a roadway shoulder for drainage purposes. P.L. 2001, ch. 577, section 2. We expect to interpret this as an exemption applying only to excavation using horizontal scraping devices (i.e. blades) and not actual digging with a scoop or shovel. We invite comments regarding this interpretation.

We propose to modify the definition of “underground facility operator” to exclude an owner of underground facilities on its own property for commercial or residential purposes. P.L. 2001, ch. 577, section 3.

Section 3: Responsibilities of the Designer

We propose to repeal this section in accordance with the Act. P.L. 2001, ch. 577, section 4.

Section 4: Responsibilities of the Excavator

We propose to insert Subsection 4(B)(3) using the language contained in the Act, which makes explicit the duty of the excavator directly responsible for performing the excavation to ascertain that all required notifications have been made. P.L. 2001, ch. 577, section 5.

We propose to amend Section 4(F) by including an exemption to the excavator notification requirements for cemetery activities and an exemption from the safety zone requirements for shoulder-grading provided that the excavators performing such activities follow certain procedures. P.L. 2001, ch. 577, section 8. We have deviated from the language of the Act in the first sentence of Subsection 4(F)(3) by putting “is” in the place of “may be” because we believe it is more consistent with the logic and intent of the provision. We invite comments regarding this word choice.

Section 6: Responsibilities of the Operator

We propose to amend Section 6(B) to make operators of underground facilities responsible for marking, in addition to their own facilities, all underground facilities used for furnishing gas and electric service that are connected to the operator’s facilities located in a public way and known to the operator. P.L. 2001, ch. 577, section 6.

We propose to add a Section 6(F) to require operators of underground facilities to notify excavators of abandoned and inactive underground facilities in the area of an excavation of which the operator is aware and to indicate the existence of such facilities in its electronic mapping system if the operator is required to maintain such a system. P.L. 2001, ch. 577, section 7.

Section 8: Administrative Penalties

We decline to amend Section 8(C) to include a provision to allow the Commission to impose an administrative penalty for the failure of an excavator operating under an exemption to follow the specified exemption procedures in Section 4(F), despite the inclusion of such a provision in the Act. P.L. 2001, ch. 577, section 11. It appears this provision is unnecessary because any excavator that fails to comply with the exemption requirements will be held to the standard excavator requirements. However, we invite comment on this deviation from the legislative amendment, particularly as to whether, as a policy or enforcement matter, there is merit to attaching the penalty to the specific requirements of the exemptions themselves, rather than to the underlying provisions of the law for which the excavator would otherwise be held accountable in the event he failed to satisfy the requirements for an exemption.

We have recognized the wording in Section 8(E) that provides for maximum penalty levels creates confusion by its use of the headings “single violation” and “multiple violations.” The current wording of this section of the rule does not appear in 23 M.R.S.A. § 3360-A(6-C) and appears to be inconsistent with the literal reading of the statutory language. In 23 M.R.S.A. § 3360-A(6-C), the Legislature imposed a maximum penalty of \$500 for any violation of the damage prevention law, except that if the person has been found in violation within the prior 12 months, the administrative penalty may not exceed \$5,000 for a violation. Experience has shown that multiple violations of the law often occur within any given incident, whether it is the alleged violator’s initial incident or a subsequent incident. We read the law to allow the imposition of a penalty up to the maximum amount for each violation, whether or not it occurs within 12 months of a prior violation. We propose to amend Section 8(E) to clarify the maximum penalty level for violations that occur during initial or subsequent incidents, with an initial incident having a maximum penalty of \$500 per violation and subsequent incidents that occur within 12 months of a finding of prior violations having a maximum penalty of \$5,000 per violation, consistent with 23 M.R.S.A. § 3360-A(6-C).

Editorial Changes

As a housekeeping matter, we propose to amend some references to the Maine Revised Statutes Annotated so that they are consistent throughout the chapter.

We propose to amend some cross-references to other sections and subsections within the Chapter so that they are consistent throughout. Any of the twelve main

headings of the Chapter or a capital letter division of those headings is referred to as a "Section". Any division below that of a capital letter is referred to as a "Subsection".

IV. PROCEDURES FOR THIS RULEMAKING

This rulemaking will be conducted according to the procedures set forth in 5 M.R.S.A. §§ 8051-8058. Written comments on the proposed amended rule may be filed with the Administrative Director no later than August 2, 2002. Please refer to the Docket Number of this proceeding, Docket No. 2002-359, when submitting comments. No public hearing on this matter is presently scheduled, but one will be held if requested by any five interested persons. Persons wishing to request a public hearing on this rule must notify the Administrative Director, Public Utilities Commission, 242 State Street, 18 State House Station, Augusta, Maine 04333-0018 (telephone: (207)287-3831), on or before July 10, 2002.

In accordance with 5 M.R.S.A. § 8057-A (1), the fiscal impact of the proposed rule is expected to be minimal. The Commission invites all interested persons to comment on the fiscal impact of this rule as well as the significance of this issue to this rulemaking given that it, in substantial part, simply brings our rule into compliance with recent legislative amendments to the damage prevention law.

The Administrative Director shall send copies of this Order and the attached Rule to:

1. All utilities operating in Maine, including natural gas pipeline utilities;
2. Sewer and cable TV operators to the greatest extent practicable;
3. Excavators operating in Maine, to the greatest extent practicable;
4. The Secretary of State for publication in accordance with 5 M.R.S.A. § 8053(5); and
5. Executive Director of the Legislative Council, 115 State House Station, Augusta, Maine 04333-0015 (20 copies).

Accordingly, it is

O R D E R E D

1. That the Administrative Director send copies of this Notice of Rulemaking and attached proposed Rule to all persons listed above.

Dated at Augusta, Maine, this 25th day of June, 2002.

BY ORDER OF THE COMMISSION

Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
 Nugent
 Diamond